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Supreme Court of the United States

OCTOBER TERM, 1933.

No. 126.

PIGEON RIVER IMPROVEMENT, SLIDE & BOOM COMPANY,
Appellant,

vs.

CHARLES W. COX, LIMITED,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

APPELLEE'S BRIEF.

STATEMENT OF CASE.

The plaintiff (appellant) was organized under the laws of Minnesota, as a slide and boom company, for the improvement of Pigeon River. Pigeon River divides the State of Minnesota and the Province of Ontario, at the northeast corner of Minnesota. This river was made the international boundary between the United States and Canada by the Webster-Ashburton Treaty ratified August 22nd, 1842 (8 U. S. Stat. 572).

The plaintiff claims that it improved Pigeon River; that its improvements aid in driving forest products down the

river; that it is entitled to tolls on pulpwood belonging to defendant, which floated down the river; and that it has a lien for such tolls on the timber floating down the river and may seize said timber and sell the same to enforce its lien.

The defendant (appellee) is a Canadian timber dealer. The wood involved was cut from Canadian lands. It was put into Arrow River in Canada and floated into the Pigeon River on its way to Lake Superior and Canadian Mills.

The questions involved were decided by the Circuit Court of Appeals in the case of *Clark vs. Pigeon River Improvement, Slide & Boom Company*, 52 Fed. (2d) 550. After that decision was filed the plaintiff amended its complaint in this case. The defendant demurred to the amended complaint. The District Court sustained the demurrer and entered judgment in favor of the defendant. From this judgment the plaintiff appealed to the Circuit Court of Appeals. The Circuit Court of Appeals (63 Fed. (2d) 567) adhered to its decision in the Clark case and affirmed the judgment of the District Court. This appeal followed.

The defendant throughout this litigation has claimed that the movement of its pulpwood on international boundary waters is foreign commerce over which the State of Minnesota has no control and that the collection of tolls on the Pigeon River would be a violation of the Webster-Ashburton Treaty.

In its amended complaint and in its assignments of error, the plaintiff relies solely upon authority granted to it by the State of Minnesota. It does not claim that it had any authority from the United States to improve Pigeon River or to collect tolls thereon.

In its brief, filed in this Court, the appellant, for the first time, also relies upon an Act of Congress (31 U. S. Stat. 1455, Chapter 878) and claims that this Act gives it author-

ity to collect tolls on appellee's pulpwood which moves into Pigeon River at a point below the cascades referred to in this act. The Act of Congress merely authorizes appellant, "under such rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe" "to enter upon Grand Portage Indian Reservation and improve the Pigeon River at what is known as the cascades of said river for the purpose of making said river *at said point* navigable for floating logs."

It is not claimed, in the amended complaint, that the Secretary of the Interior did prescribe rules and regulations for improvement of Pigeon River at the point known as the cascades or elsewhere, or that any improvement was made under such rules or regulations.

Unless the Act of Congress above referred to, without averment showing appellant entitled to the benefits thereof, gives it such authority, the plaintiff has no authority from the United States or any department thereof.

TREATY PROVISIONS.

The Webster-Ashburton Treaty defines the boundary between Minnesota and Ontario as follows:

> "Through the middle of the sound between Ile Royale and the northwestern mainland, to the mouth of the Pigeon River, *and up said river* and through the North and South Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods; thence along the water communication to Lake Saisaginaga, and Lac du Bois Blanc, Lac la Croix, Little Vermilion Lake and Lake Namecan, and through the several small lakes, straits, or streams, connecting the lakes here mentioned, to that point in Lac La Pluie or Rainy

Lake, at the Chaudiere Falls, from which the commissioners traced the line to the most northwestern point of the Lake of the Woods."

After describing the boundary it is further provided:

"That all water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used, shall be free and open to the use of the citizens and subjects of both countries."

MINNESOTA CAN NOT REGULATE FOREIGN COMMERCE.

The movement of forest products from Canada into and along Pigeon River is foreign commerce.

Practically the same question involved in this litigation was discussed by the Circuit Court of Appeals in *Rainy Lake River Boom Corporation vs. Rainy River Lumber Company,* 162 Fed. 287, in which this Court denied a petition for a writ of certiorari (212 U. S. 574). In the Rainy Lake case the Circuit Court considered the right of the plaintiff to collect tolls on the Rainy River, which is also a part of the boundary between Minnesota and Ontario. The Court, on page 292, said:

"As applied to this river, it is perhaps not too much to say that the term, 'state and interstate commerce,' has no exact relation. While logs were driven from points on the Minnesota side to other points on the same side, and some were destined beyond the limits of the state, and this was true of shipments on the Canadian side of the river, the commerce partook of the

character of foreign commerce, because citizens of the United States and their property necessarily come in contact with citizens and subjects of Great Britain and their property on an international highway, declared by treaty between the two countries to be free and open to the use of the subjects and citizens of each."

This statement was quoted with approval in the Clark case. And the Rainy River case and the Clark case were cited with approval in the decision of the Circuit Court of Appeals (63 Fed. (2d) 567) in this case.

It is well settled that the Government of the United States is the only authorized authority to regulate commerce with foreign nations. Section 8, Article I of the Constitution of the United States provides: "The Congress shall have power, to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Regardless of the fact that the Pigeon River is an international highway and that the movement of timber products on this river is foreign commerce, the State of Minnesota chartered the plaintiff company and attempted to give it power to improve this international boundary water and charge tolls upon Canadian timber driven, sluiced or floated on the same. The state also attempted to give to plaintiff a lien on the timber for such tolls and the right to seize and sell the timber to enforce such lien (Sections 7550-7552, *Mason's Minnesota Statutes,* 1927).

The pulpwood involved in this case is cut from Canadian soil, handled by Canadian labor and put into the Arrow River, which is an interior water course of the Dominion of Canada. The Arrow River flows into the Pigeon River on the Canadian side. The wood moves down the Arrow River into the Pigeon River and down the Pigeon River into Lake

Superior, on its way to Canadian mills. It does not come within the territorial limits of the United States.

The Appolon, 9 Wheat. 362.

The Pilot, 50 Fed. 437.

The Fame, Fed. Case No. 4634.

The Act of the Province of Ontario, under which the Arrow River and Tributaries Slide and Boom Company, Limited, is organized, has the same standing with reference to the Pigeon River as an Act of Congress would have with reference to that international boundary. An Act of the Legislature of the State of Minnesota, on account of the constitutional provisions giving to Congress the exclusive power to regulate foreign commerce and making treaties the supreme law of the land, has no such standing.

Arrow River Tributaries Slide and Boom Company, Limited, vs. Pigeon Timber Company, Limited, 1932 Canadian Supreme Court Report 495.

In the Clark case the Circuit Court of Appeals said:

"The other question is that of obstruction to foreign commerce by a corporation organized under the law of the State of Minnesota. By Article 1, Section 8 of the Constitution, Congress is given plenary power to regulate commerce with foreign nations, and the states cannot interfere therewith. There is no limitation to such power except as may be prescribed in the Constitution. The government of the United States is the only authority authorized to regulate commerce with foreign nations. *Buttfield vs. Stranahan,* 129 U. S. 470. States do not make treaties and can not by legislative act interfere with the proper observation of treaties nor destroy rights created thereby. It may well be inquired where the State of Minnesota acquired any authority

to burden commerce passing from one point in Canada down an international boundary to another point in Canada."

In the Rainy River case the Circuit Court of Appeals, on page 292, said:

> "This treaty, having been made under the authority of the United States, became 'the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding.' Article VI, Const. United States. The right to the free and open use of this river by a citizen of Canada is not referable to any local regulation of a state of the United States that chances to be erected contiguous to the river, but it is established by said treaty."

After reviewing its decisions in the Rainy River case and the Clark case the Circuit Court of Appeals, in the decision in this case, said:

> "In the Clark case we considered the provisions of the Webster-Ashburton Treaty involved here, and went into the matter rather thoroughly, consulting the diplomatic correspondence between the authors of this treaty in order to throw light on the meaning of the terms employed. Our conclusion in the Clark case was against the theory advanced by appellant in this case, and we held that the movement of Canadian pulpwood on the Pigeon River was foreign commerce over which the State of Minnesota could exercise no control, and that the collection of tolls on the river under grant of a franchise by the State of Minnesota would be a violation of the Webster-Ashburton Treaty."

In reading the Canadian decision in the Arrow River case,

it is important to keep two things in mind: First: It is the law in Canada that where "a treaty provides that certain rights or privileges are to be enjoyed by the subjects of both contracting parties, these rights and privileges are under our (Canadian) law enforceable by the courts only where the treaty has been implemented or sanctioned by legislation rendering it binding upon the subject." In this respect the Canadian law differs from the law in the United States where, by an express provision of the Constitution, treaties are made the supreme law of the land and are enforced in all of the state and Federal courts. Second, "within the provincial area * * * the legislative competence of a provincial legislature is plenary and as ample as the imperial parliament in the plenitude of its power possessed, and could bestow." In this respect, also, the law in Canada differs from the law in the United States for the reason that the Government of the United States has the exclusive and absolute power to regulate foreign commerce and the state has no power to regulate or control such commerce, whereas, in Canada, there is no such limitation upon the power of the provincial legislature. In view of the fact that in British countries treaties are not binding on the individual subject in the absence of legislation sanctioning the provision of the treaty, the treaty does not impose any limitation upon the legislative power of the Legislature of the Province of Ontario.

An act of the Legislature of the State of Minnesota, on account of the constitutional provisions giving to Congress the exclusive power to regulate commerce and making treaties the supreme law of the land, has no such standing.

PIGEON RIVER A BOUNDARY WATER.

The Webster-Ashburton Treaty (Article II) sets forth that the international boundary line theretofore fixed by commissioners under the Treaty of Ghent terminates near the northeastern point of Isle Royale. The writers of the treaty fixed the line from this point as follows: "Through the middle of the sound between the Isle Royale and the Northwestern mainland, to the mouth of Pigeon River and *up the said river,* to and through the North and South Fowl Lakes, to the lakes of the height of land between Lake Superior and the Lake of the Woods."

In making the St. John and St. Francis Rivers a part of the boundary, the writers of this treaty (Article I) said that the line shall run "up the middle of the main channel of the said River St. John, to the mouth of the River St. Francis; thence, up the middle of the channel of the said River St. Francis, and of the lakes through which it flows, to the outlet of the Lake Pohenagamook."

The treaty (Article I) also provides that the line shall run "to the head of Hall's stream; thence, down the middle of said stream."

We call attention to the fact that the Thalweg theory of boundary is adopted until the line reaches the mouth of the Pigeon River, then the river itself is designated as the boundary. This made the entire Pigeon River boundary waters.

At the time the act authorizing the people of Minnesota to form a state government (11 U. S. Stat., Chap. 60, Public Acts) was passed by Congress on February 26, 1867, the Webster-Ashburton Treaty was in full force and effect and has so remained ever since that time. This act, authorizing the people to form a state government, provides as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the inhabitants of that portion of the territory of Minnesota which is embraced within the following limits, to-wit: Beginning at the point in the center of the main channel of the Red River of the North, where the boundary line between the United States and the British Possessions crosses the same; thence up the main channel of said river to that of the Boix des Sioux River; thence (up) the main channel of said river to Lake Travers; thence up the center of said lake to the southern extremity thereof; thence in a direct line to the head of Big Stone lake; thence through its center to its outlet; thence by a due south line to the north line of the state of Iowa; thence east along the northern boundary of said state to the main channel of said river, and following the boundary line of the state of Wisconsin, until the same intersects the St. Louis River; thence down said river to and through Lake Superior, on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and British possessions; *thence up Pigeon River,* and following said dividing line to the place of beginning—be and they are hereby authorized to form for themselves a constitution and state government, by the name of the State of Minnesota, and to come into the Union on an equal footing with the original states, according to the federal constitution.

Sec. 2. And be it further enacted, That the said State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said state of Minnesota, so far as the same shall form a common boundary to said state and any other

state or states now or hereafter to be formed or bounded by the same; and said river and waters, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll, therefor."

This act makes the boundary of Minnesota the center of the main channel of the Red River of the North and adopts the line already established for the state of Wisconsin and the state of Iowa, but when the northern boundary is defined this language is used: *"Thence up Pigeon River,* and following said dividing line to the place of beginning."

In conferring jurisdiction upon the State of Minnesota, the act authorizing the State Government grants to the state "concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same. It does not grant to the State of Minnesota concurrent jurisdiction on waters which form a common boundary to said state and any foreign country bounded by the same.

It would seem from this that the act authorizing a state government recognizes the fact that, although the Pigeon River borders on the State of Minnesota, it has already, by the terms of the treaty, been designated an international highway over which the State of Minnesota has no jurisdiction.

ROOT-BRYCE TREATY.

In 1909 the United States and Great Britain entered into the Root-Bryce Treaty (36 U. S. Stat. 2448) and thereby made all waters along the line, from main shore to main shore, boundary waters and created an international commission to prevent disputes regarding the use of such boundary waters. Pigeon River, from main shore to main shore, had already been made such a boundary water by the Webster-Ashburton Treaty. The imaginary boundary line running close to the middle of the Pigeon River, shown on the maps attached to the amended complaint, was not established by the Webster-Ashburton Treaty but was fixed by a survey made under the direction of the international joint commission created by the Root-Bryce Treaty. This treaty does not authorize the collection of tolls by the appellant.

PIGEON RIVER A WATER COMMUNICATION.

A claim is made that the Pigeon River, from its mouth to Fort Charlotte is not a "water communication" within the meaning of the Webster-Ashburton Treaty, because it is claimed that this portion of the river was not actually used at the time the treaty was written. The Circuit Court of Appeals, in the Clark case said:

> "It certainly would not be a liberal interpretation of this treaty to hold that the parties intended only to preserve water communications and portages for fur traders operating in canoes. Such lack of any vision as to the future is inconceivable."

In support of its claim that Pigeon River, from Fort Charlotte to its mouth, is not a "water communication" the appellant refers to diplomatic correspondence leading up to the

signing of the treaty and also President Tyler's message submitting the treaty to the Senate. We submit that the treaty is not ambiguous; and that "water communications" includes all of the Pigeon River. But a casual review of the diplomatic correspondence, as well as the president's message, leads one to the conclusion that this correspondence supports the claim of appellee that the expression "water communications" includes all of the Pigeon River and does not support the claim of appellant that this expression does not include that part of Pigeon River from its mouth to Fort Charlotte.

DIPLOMATIC CORRESPONDENCE ON "WATER COMMUNICATIONS."

All of the diplomatic correspondence leading up to the signing of the Webster-Ashburton Treaty and also President Tyler's message submitting the Treaty to the Senate, is found in Senate Documents, Third Session, Twenty-seventh Congress, Volume One.

Figures in parentheses under this heading refer to pages in that publication.

We submit that the diplomatic correspondence supports the decisions of the Circuit Court of Appeals to the effect that it would "give the Treaty a narrow and apparently distorted construction," to hold that the expression "water communications" does not include that part of the Pigeon River from its mouth to Fort Charlotte.

Delafield had advised Webster (103) that "The Pigeon River is a continuous water course."

Webster had asked Ferguson (104) to "describe the Pigeon River, its estuary or bay at its mouth, its size, and the nature of its channels and current in the last five or ten miles of its course." Also, "What is the general nature of the

country between the mouth of Pigeon River and the Rainy Lake? Of what formation is it and how is its surface? And will any considerable portion of its area be fit for cultivation? Are its waters active and running streams, as in other parts of the United States, or are they dead lakes, swamps and morasses? If the latter be their general character, at what point as you proceed westward do the waters receive a more decided character as running streams?

Ferguson had advised Webster (105) that "as an agricultural district, this region will always be valueless. *The pine timber is of high growth*, equal for spars, perhaps, to the Norway pine, and may, perhaps, in time, find a market; but there are no alluvions, no arable lands, and the whole country may be described as one waste of rock and water."

We also call attention to the fact that commissioners representing the States of Maine and Massachusetts were invited to take part in the negotiations leading up to the signing of the treaty. This was because Maine and Massachusetts were to be asked to give up land claimed by those states to be within their territorial limits. The correspondence (78 to 99) between these commissioners and Daniel Webster is significant. From this correspondence, as well as the correspondence between Webster and Ashburton, it is clear that the right to be given the states to transport the produce of the forest down the River St. John was considered a valuable concession on the part of Great Britain.

It is certain that Webster and Ashburton knew that the "lumberers" transported the produce of the forest to market by floating and driving the same down the streams along which the timber grew. Reference to this is also found in the treaty itself (Article III) wherein it is provided that "the navigation of the said river shall be free and open to both parties and shall in no way be obstructed by either;

that all the produce of the forest * * * shall have free access into and through the said river and its tributaries * * * to and from the seaport at the mouth of said River St. John."

The framers of the treaty also knew that the timber along the Pigeon River was of high growth which would eventually find a market; that this timber could not be transported over Grand Portage from Fort Charlotte to Lake Superior or over the portages along the line; that the country was a waste of rock and water valueless for agriculture; and that the Pigeon River was a continuous water course. Webster and Ashburton knew that the only way to get this timber to market was by driving it down the Pigeon River. And they provided that the water communications should be free and open to the use of the citizens and subjects of both countries.

Isn't it true that the appellant "imputes a want of vision to the framers of the treaty" when they contend that these wise statesmen made provision for the travel of fur traders only and that they entirely ignored the probability that the Pigeon River would be used to transport to market the produce of the forest in the same way that such "navigation" was carried on along the northeastern boundary waters? Why did Webster want to know if Pigeon River was a running stream or a dead swamp? Why did he not accept Ashburton's proposition (57) that the Grand Portage route be made the boundary? He knew that the land was valueless except for timber growing thereon (105). He inquired from Ferguson about the bay at the mouth of the Pigeon River, about the nature of the channel and current in the last five or ten miles of its course and whether its waters were active or dead lakes, swamps and morasses; and, if the latter, at what point westward "do the waters receive

a more decided character as running streams"? If Pigeon River were not a continuous running stream, Webster might have agreed to accept Ashburton's proposition to make the Grand Portage route the boundary. But he was not willing to place the American timber dealers in the same position in which the timber dealers of Maine were in, without an outlet for the produce of the forest. If the Grand Portage route had been accepted by Webster, the Pigeon River from Fort Charlotte to its mouth would have been in British territory just the same as the River St. John was in British territory. Webster had been advised by the commissioners of Maine (87) that "while they (British) had a supply of their own, the right of carrying down our lumber was most strenuously and pertinaciously resisted," and that the Maine timber dealers, in order to get their timber to market, had to dig "a channel across the range of British highlands." So Webster rejected the Grand Portage route and the Pigeon River was made the boundary "free and open" to the use of the citizens and subjects of both countries.

The Pigeon River was not made free to ships, boats and vessels only. It was not made free for travel alone. It was made free for whatever use the citizens and subjects of both countries might find it useful at any time in the future. It is made a perpetual privilege, as was the privilege "perpetual in its terms" on the River St. John. This expression was used by President Tyler (20).

The very word "communication," is used in the correspondence. Lord Ashburton (43-44) wrote in the course of this correspondence, "Important anxiety has been expressed that Maine should be assured of some means of communication by the St. Johns, more especially for the conveyance of her lumber." It is common knowledge that the word, "lumber," at the time this treaty was written and for years thereafter,

was used with reference to all forest products. A "communication for the conveyance of lumber" could refer to only one thing, to-wit: A river or other water communication which might be used for floating and driving logs and other forest products. No other communication for conveyance of timber out of the wilderness was known to the framers of the treaty.

In view of the fact that Webster and Ashburton were writing and talking to each other about "communications for the conveyance of timber," can it be said that these men, in making "water communications" free and open, referred only to the travel of fur traders? Why didn't they say that the fur traders would have the right to pass over the water communications and portages without subjection to any discriminating toll? They did say that the channels in the River St. Lawrence shall be free and open to the boats, ships and vessels, and, referring to communications for conveyance of timber, they used the language, "water communications shall be free and open to the use of the citizens and subjects of both countries."

On this point, we also call attention to the very convincing argument of Justice Lamont of the Supreme Court of Canada in the opinion written by him in the Arrow River case:

> "In construing the treaty we have to determine the intentions of the framers thereof as expressed in the words used. Did they intend that the whole river should come within the term, 'water communications,' or only those parts of it between portages over which boats could pass at the date of the treaty? In order to understand these words it is material to inquire what was the subject-matter with respect to which they were used, and the object the framers of the treaty had in view? The subject-matter to which they were applied

was the waters of the Pigeon River, and other rivers, streams and lakes up which the boundary line from Lake Superior to the Lake of the Woods was being run. The objects of the provision was to secure to the subjects of both countries the free and untrammeled right to use these water stretches irrespective of whether they were on one side of the boundary line or the other.

Although at the date of the treaty the chief purpose for which these water communications were being used was the transportation by boat or canoe of persons and goods, the clause in question places no limit on the purposes for which they might be used. They are to be 'free and open' to the people of both countries for whatever purpose they may desire to use them as a water communication. If, therefore, they could be used for any purpose which did not necessitate the making of a portage to get past a point of danger, I see nothing in the clause, or in any other part of the treaty, which would compel the use of the portage in order to have a free passage. To hold that water communications should be limited to those portions of the river navigable by boats at the time the treaty was signed, would, in my opinion, be to give too narrow a construction to the language used, and to impute a want of vision to the framers of the treaty.

Furthermore, such a construction would lead to the result that certain portions of the river around which portages had to be made at the date of the treaty owing to low water, would not constitute a water communication at another season when boats could pass over them with ease and safety."

The writers of this treaty knew what they were doing

when they used the expression, "water communications." The right to float timber products down the St. Francis River was one of the important concessions granted to the States of Maine and Massachusetts in order to get the consent of those states to the terms of a treaty, which awarded to Great Britain territory claimed by Maine and Massachusetts. The timber business was already an important industry and had been important to the inhabitants of Maine, Massachusetts, New Hampshire and the Provinces on the Canadian side.

It is inconceivable that Webster and Ashburton, who were making provision for the free and open use of water communications, would agree upon a provision which would make necessary the carrying of forest products over portages along the line and also over Grand Portage. But if we adopt the interpretation that the water communichtions and the portages were made free and open for travel only, the inevitable result is that the timber dealers must carry their logs along the same route which the fur traders followed in their canoes. The fact that the Pigeon River has falls or other obstacles which would make "navigation for the conveyance of timber" difficult, would not keep the framers of this treaty from making the stream free and open for this purpose. They knew that timber dealers, in driving forest products to market, had to overcome obstacles in some of the streams. This was true, for instance, in the River St. Francis, regarding which the commissioners of Maine wrote to Daniel Webster (86): "The River St. Francis is one whose course is exceedingly crooked, having many sharp bends, so that while the distance by the river and lakes from the Grand Portage to the mouth of the St. Francis is estimated by the assistant geologist of Massachusetts, who followed it down its whole length, at not less than eighty-five

miles, the distance from the one point to the other in a straight line is only about forty miles." Reference is here made to another "Grand Portage." The River St. Francis was used for driving forest products even along those places where navigation by boat would have to pass over portages along the line. The forest products growing in the upper reaches of the River St. John floated down that river to the seaport at the mouth of the river. Hall's Creek was used for floating and driving the produce of the forest and of agriculture. Did Lord Ashburton and Daniel Webster, knowing all of this, intend to provide that the produce of the forest, in logs, lumber, timber, boards, staves or shingles, or of agriculture, would have to be carried across Grand Portage from Fort Charlotte to Lake Superior? This is a distance of nine miles over which supplies and furs were carried on the backs of human beings. It would have been impossible, of course, to move the timber out of the forest in this way. Did they not have in mind that the water communications forming the boundary at this point might be used for floating and driving the produce of the forest and of agriculture, the same as the streams in the vicinity of the northeastern boundary and streams in other parts of the United States and Canada were used at that time? To hold otherwise would "impute a want of vision to the framers of the treaty."

We respectfully submit that the expression, "water communications," includes the whole of the Pigeon River.

PIGEON RIVER FREE AND OPEN.

The appellant claims that "free and open" should be construed to mean "thrown open to the use of the citizens of both countries on equal terms" and that this expression is not inconsistent with the imposition of tolls. The language of the treaty, however, seems to be clear enough and it is hardly necessary to resort to correspondence between Webster and Ashburton in order to determine what it means. It means that the citizens and subjects of both countries have a right to use the Pigeon River without interference and without paying for so doing.

In the Clark case, the Circuit Court of Appeals, in discussing the decision in the Rainy River case, said:

> "The Court discussed this article of the treaty we are considering and pointed out that the right to the free and open use of the river under the treaty by a citizen of Canada can not be limited by local regulations of a state. Its view of the free use of a stream was exempt from duties imposed or exacted by either of the countries to the compact."

In the Rainy River case, the Circuit Court of Appeals said:

> "The language of the treaty in question is not only that this water communication shall be free to the use, but also open to the subjects and citizens of both countries; that is to say, it shall not be closed or otherwise so obstructed by either country as to prevent its *free and equal use.*"

Other provisions of the treaty itself support this construction. Article VII of the treaty provides as follows:

> "VII. It is further agreed that the channels in the

River St. Lawrence on both sides of the Long Sault Island and of Barnhart Island, the channels in the River Detroit, on both sides of the Island Bois Blanc, and between that Island and both the Canadian and American shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name shall be equally *free and open* to the ships, vessels and boats of both parties."

Did the writers of the treaty intend to say that the ships, vessels and boats of both parties might navigate the channels of the River St. Lawrence only upon payment of tolls imposed by the State of New York or the Province of Ontario? This seems to be a distorted construction of the plain words of the treaty. The natural and ordinary meaning of the words, "free and open," is that the owners of the boats, ships and vessels have a right to use the channels of the St. Lawrence without paying for so doing.

Article III of the treaty provides that the navigation of the River St. John shall be free and open to both parties, "provided, always, that this agreement shall give no right to either party to interfere with any regulations not inconsistent with the terms of this treaty which the governments, respectively, of Maine or of New Brunswick may make respecting the navigation of the said river, where both banks thereof shall belong to the same party."

It is significant that the writers of the treaty provided specifically that Maine or New Brunswick may enforce regulations respecting navigation of the River St. John, where both banks of the river belong to that state or province. Where both banks belong to Maine the river is an interior water rather than a boundary water and, at this point, the

river, perhaps, is not free and open to the citizens and subjects of both countries but may be subject to regulations respecting the use of the river.

On this point, also, we have a very convincing argument from Justice Lamont of the Canadian court, in the opinion written by him in the Arrow River case:

> "I can not agree with the appellant's contention that the words, 'free and open,' in the last clause of article 2, are consistent with the imposition of tolls for the use of improvements erected in the river. In my opinion the meaning of these words in the clause is that the citizens of both countries are to be at liberty, as a matter of right, to travel these waters on both sides of the fixed boundary line without let or hindrance from anyone, or having to pay anything for so doing. This seems to me to be the natural and ordinary meaning of the words and the meaning which, at the time of the treaty, the subjects of both countries would place upon them. That this is the meaning the words were intended to bear seems to me to be indicated also by article 7 of the treaty, which reads:
>
> 'VII. It is further agreed that the channels in the River St. Lawrence on both sides of the Long Sault Island and of Barnhart Island, the channels in the River Detroit, on both sides of the Island Bois Blanc, and between that island and both the Canadian and American shores, and all the several channels and passages between the various islands lying near the junction of the River St. Clair with the lake of that name shall be equally free and open to the ships, vessels and boats of both parties.'

If we give effect to the appellant's interpretation of the words, "free and open," it would entitle either of the

contracting parties who improved the navigation of any of the channels on its own side of these waters to levy a toll on every vessel making use of such channel. I can not believe such to have been the intention of the parties. As Riddel, J. A., pointed out in his judgment below, the appellants hereby building upon the bed of the river had interfered with the enjoyment of the free and open use of it by the citizens of the United States. This, as I read it, is contrary to the treaty."

DIPLOMATIC CORRESPONDENCE ON "FREE AND OPEN."

Here, again, figures in parentheses refer to pages in Senate Documents, 3rd Session, 27th Congress, Volume 1.

Webster had written Ashburton (61) that "When the proposed line shall be properly described in the treaty, the grant by England of the right to use the waters of the River St. John for the purpose of transporting to the mouth of that river all the timber and agricultural products raised in Maine * * * without subjection to any discriminating toll, duty or disability is to be inserted."

The commissioners representing the States of Maine and Massachusetts (87) thought that the free navigation, including the driving of the products of the forest, to be as advantageous to the British as it was to the Americans.

When the Commissioners, representing the State of Massachusetts, finally consented to the treaty (93), they did so with the understanding that "The right to the free navigation of the River St. John shall include the right to the free transportation thereupon of all products of the soil as well as the forest."

When the Commissioners representing the State of Maine,

finally consented to the treaty (98-99), they did so with the understanding that "the right of free navigation of the St. John, as set forth in the proposition of Mr. Webster's on the part of the United States, shall extend to and include the products of the soil, in the same manner as the products of the forest; and that no toll, tax or duty be levied upon timber coming from the territory of Maine."

Webster, in writing to Ashburton, had used the expression (61), "Without subjection to any discriminating toll, duty or disability." And in one of his letters to the commissioners of Maine (82), referred to the use of the River St. John for the conveyance of timber "free from all discriminating tolls, impositions or inabilities of any kind, the timber enjoying all the privileges of British Colonial timber." Ashburton had used the expression (55), "The right to use the St. John for floating down the lumber of Maine, on the same terms as the river is used by the Queen's subjects."

We must assume, therefore, that Ashburton and Webster knew how to express themselves, and, if they wanted to say that the water communications would be "thrown open to the use of the citizens of both countries on equal terms without discrimination," they would have used suitable language to express this meaning. It would only have been necessary for them to use the same expressions which they had used in their correspondence. The right to use the river "on the same terms as the river is used by the Queen's subjects," would express this meaning. The right to use the waters for the purpose of transporting timber "without subjection to any discriminating toll, duty or disability" would express this meaning. These expressions, if incorporated into the Treaty, would support the argument of appellant, that the agreement was for equal treatment on the river.

But the commissioners representing the States of Maine

and Massachusetts were not satisfied with freedom from discriminating tolls, nor were they satisfied with the use of the river on the same terms as the river was used by the Queen's subjects. They insisted that no toll, tax or duty be levied upon timber floating down the river. And when the Treaty was finally written, the words, "without discriminating tolls," or "on the same terms as the river is used by the Queen's subjects," were not incorporated therein. The language used in the treaty (Article III) was that "the navigation of the said river shall be free and open to both parties." And so far as the boundary between Lake Superior and Lake of the Woods is concerned, the treaty provided that the water communications shall be free and open to the use of the citizens and subjects of both countries.

Now, in view of the fact that "discriminating tolls" and "on the same terms as the river is used by the Queen's subjects" had already been discussed, it is inconceivable that the framers of the treaty, by the omission of any such language, intended to provide that no charge of any kind should be levied upon timber floating down the river.

Webster wrote to Ashburton (45), "that if one element or one part in the description be uncertain, it is to be explained by others which are certain, if there be such others," and again (46), "what may be doubtful in itself, may be made certain by other things which are certain." These were correct statements of the rule to be applied at the time and they are still correct statements of the law.

The claim that the water communications are free of all charges is also supported by the provision in the treaty and the correspondence relating to the use of boundary waters for ships, boats and vessels.

Ashburton (57) called attention to the fact that, at the head of Lake St. Clair and at St. Regis on the River St.

Lawrence, the channels on the American side are best for navigation and said: "We want a clause in our present treaty to say that * * * the several channels of the river shall be used in common by the boatmen of the two countries."

In Webster's answer to Ashburton (58), he said: "You have suggested * * * that boats belonging to Her Majesty's subjects may pass the Falls of the Long Sault in the St. Lawrence on either side of the Long Sault Islands and that the passages between the islands lying at or near the junction of the River St. Clair, with the lake of that name, shall be severally free and open to the vessels of both countries. There appears no reasonable objection to what is requested in these particulars; and on the part of the United States it is desirable that their vessels, in proceeding from Lake Erie into the Detroit River, should have the privilege of passing Bois Blanc, an island belonging to England, and the Canadian shore, the deeper and better channel being on that side."

Ashburton's reply to Webster (62) contained the following: "The stipulations for the greater facility of the navigation of the River St. Lawrence, and of two passages between the upper lakes, appear evidently desirable for general accommodation, and I can not refuse the reciprocal claim made by you to render common the passage from Lake Erie into the Detroit River. This must be done by declaring the several passages in those parts free to both parties. The language finally adopted was (Article VII): "It is further agreed that the channels * * * shall be equally free and open to the ships, vessels and boats of both parties."

President Tyler also said (20) that the privilege of transporting timber on the waters of the River St. John shall be "free from imposition or disability" and (21) that the chan-

nels shall be "free and open." He did not refer to equal treatment or without discriminating tolls. And the record indicates that President Tyler and Webster and Ashburton and also the commissioners from Maine and Massachusetts had a command of the English language which made it possible for them to write clearly the ideas which they wanted to express. If it had been the intention that no discriminating tolls were to be levied, the treaty would have so stated.

APPELLANT'S AUTHORITIES ON "FREE AND OPEN."

In its brief the appellant calls attention to that line of cases, such as *Huse vs. Glover*, 119 U. S. 543, in which this Court has held that reasonable charges for the use of property is not an interference with that freedom of transportation between states which is secured under the commerce clause. None of these cases, so far as we have found, deal with the improvement of international waters under state authority and without sanction of the Federal Government. In those cases, reliance is placed upon the jurisdiction of the state over a stream entirely within its boundaries or upon the concurrent jurisdiction on streams which form the boundaries between the states.

This line of cases was before the Court in the Rainy River case. The Court quoted from the case of *Huse vs. Glover*, 119 U. S. 543, also from the case of *Osborn vs. Knife Falls Boom Corporation*, 32 Minn. 412, also from the case of *Cardwell vs. American River Bridge Company*, 113 U. S. 210. The case of *Willamet Iron Bridge Company vs. Hatch*, 25 U. S. 9, was also referred to in the Rainy River decision.

The Court in discussing this line of authorities called attention to the fact that any action of a state which has been

upheld is based entirely upon the state's jurisdiction over its internal domestic affairs. It quotes from the Osborn case that part of the decision which relates to the necessity that the Legislature of a state determine how the common highways within that state shall be enjoyed. After fully considering this line of authorities, the Court was of the opinion that the State of Minnesota has no jurisdiction on an international highway and no control over foreign commerce on such a highway.

CANADIAN DECISION.

We have already referred to the Arrow River case decided in the Supreme Court of Canada, 1932, Supreme Court Reports 495.

We have pointed out that, in considering this decision, it is important to keep in mind that treaties in British countries are not "the supreme law of the land" unless sanctioned by legislation. We have also pointed out that an Act of the Legislature of Ontario regulating foreign commerce, has the same standing in that Province and in the Dominion of Canada as an Act of the Federal Government has in the United States.

We have quoted from the opinion of Justice Lamont of the Supreme Court of Canada in the Arrow River case, as to the meaning of "water communications" and "free and open." It seems to us that the reasoning of Justice Lamont of the Canadian Court supplements what was said by the Circuit Court of Appeals and that the reasoning is irrefutable.

A careful reading of this Canadian decision will reveal that the real reason for the reversal of the Ontario decision was that the provisions of the Webster-Ashburton Treaty

have not been sanctioned by legislation and will not, therefore, be enforced in the Canadian Courts. It seems that, in British countries, a treaty must be enforced through diplomatic channels, until the treaty has been sanctioned by legislation.

In addition to this, the Supreme Court of Canada points out that the Legislature of Ontario has plenary power and that there is no restriction on its control over foreign commerce.

The argument relied upon by the appellant is that "free and open" does not mean freedom from tolls. The appellant has, on this point, the support of only one of the Canadian Justices. Chief Justice Anglin said: "I should, however, have preferred it had the majority of the Court seen its way clear to base its decision upon a holding that upon the true construction of the clause of the Ashburton Treaty * * * it was merely meant to ensure to the citizens of both countries equality of rights in regard to water communications, portages, etc."

Apparently this construction of the treaty was urged upon the Supreme Court of Canada but that Court refused to adopt it. Chief Justice Anglin favored it. No other member of the Court agreed with him.

Justice Smith of the Canadian Court wrote an opinion in which he said that he could see no reason for preserving a right to use the Pigeon River for any purpose for which it was not used by the fur traders. He seems to have overlooked what President Tyler had so clearly in mind, that the framers of the treaty were writing an agreement which was to be "perpetual in its terms" (Senate Documents, Third Session, 37th Congress, Vol. I, page 20). An examination of the briefs filed with the Canadian Court, indicates

that the important consideration given by the framers of the treaty to the right to drive timber on the water courses along the northeastern boundary, was not called to the attention of the Court; that the Court did not know that Lord Ashburton, in a letter to Daniel Webster, had referred to a "communication for the conveyance of lumber"; that the Court did not consider the fact that Webster and Ashburton knew of the "pine timber of high growth" along the Pigeon River which was likely "to find a market"; and that they also knew that the Pigeon River is a continuous water course, similar to the streams in other parts of the United States and Canada which were then used for transportation of timber products.

Although the meaning of the expression, "free and open," must have been fully discussed by the Court, Justice Smith and Justice Rinfret, who concurred in his opinion, refused to hold that this expression merely referred to an equality of rights on the water communications. Apparently four of the members of the Supreme Court of Canada agree with the view of the Circuit Court of Appeals that "the free use of a stream was exemption of duties imposed or exacted by either of the countries to the compact."

"AS NOW ACTUALLY USED" APPLIES ONLY TO GRAND PORTAGE.

In the Clark case the Circuit Court of Appeals said:

> "Appellee's theory is that the words of the article 'as now actually used' limit water communications and the usual portages to such traffic as they were used for at that time, *i. e.*, as a fur trader's route, and have no reference to the floating of logs, and do not impair the power of the State of Minnesota to permit the collec-

tion of proper tolls and charges for benefits conferred upon the users of appellee's improvements. As a matter of grammatical construction an argument might be made that the term, 'as now actually used,' applies to all the water connections and early portages and not merely to Grand Portage, but it appears from the record that Grand Portage alone of all the portages is not 'along the line' and we think therefore the words, 'as now actually used,' refer only to Grand Portage. Any other theory would give the treaty a narrow and apparently distorted construction. Good faith between nations requires carrying out treaty obligations according to the intentions of the contracting parties."

In the Arrow River case, two of the Justices of the Canadian Court (Smith and Rinfret) "are unable to agree with the view expressed by the Circuit Court of Appeals" that the words "as now actually used" apply only to Grand Portage. They therefore, reached the conclusion that "water communications" does not include that part of Pigeon River between its mouth and Fort Charlotte. In the Clark case, the Circuit Court of Appeals pointed out that such a construction imputes a want of vision to the framers of the treaty and is not the liberal interpretation which the United States law demands. The opinion of the Supreme Court of Canada in the Arrow River case was before the Circuit Court of Appeals in this case. This caused the Circuit Court of Appeals to review its former decision very carefully but the Court could not place a different construction upon the treaty provisions.

After reading the entire record, including the correspondence and the treaty itself, one must come to the conclusion that Webster and Ashburton would hardly say that the

usual portages along the line as now actually used, are to be free and open. They would and did say that "all water communications and all the usual portages along the line" are to be free and open. They also made "Grand Portage, from the shore of Lake Superior to the Pigeon River, as now actually used," free and open.

Grand Portage is the only portage which is not "along the line." This is clear from an examination of the maps which are attached to the amended complaint. The appellant's claim that a portage which may run back from the river a quarter of a mile is not "along the line" merely emphasizes the fact that Grand Portage is the only portage which is not "along the line."

The reasoning contained in the opinion written by Justice Smith does not have the same convincing force as the reasoning contained in the opinion written by Justice Lamont, which was concurred in by Justice Cannon. These Justices (Lamont and Cannon) adopt the conclusions of the Circuit Court of Appeals in the Clark case and add "another and practical reason" why Grand Portage was the only portage limited by the words, "as now actually used." They say that all of the portages along the line were followed to get around parts of the river over which it was dangerous to take boats; that practical traders, traveling along the river, would always find and take these advantageous portages around the obstacles in the river; while Grand Portage was a land strip of nine miles over which several routes might be established and it was desirable that the Grand Portage route be specifically defined so that there would be no more than one route free and open for traffic, so far into American territory. This was done by limiting the Grand Portage route to the one actually used. The conclusion of these Justices (Lamont and Cannon) is that Pigeon River from

its mouth forms part of the "water communications" which were to be free and open.

We respectfully submit that the construction placed upon the expression, "water communications," by the Circuit Court of Appeals and by Justices Lamont and Cannon of the Canadian Court is the construction which a liberal interpretation of the treaty demands.

But, argues appellant, the Canadian company can not maintain its part of the works on the Canadian side, if the Minnesota company is prevented from maintaining its portion on the American side.

We submit that the only justification for the Canadian decision is that the provisions of the treaty will not be enforced in Canadian courts until the same are incorporated in an act of the Canadian Parliament or an act of the Ontario Legislature; and the further fact that an act of the Ontario Legislature authorizing improvement of the river and collection of tolls has the same standing as an Act of Congress would have in this country. In the United States, the treaty is the supreme law of the land and the Minnesota Legislature has no jurisdiction over international waters or foreign commerce. The liberal interpretation which we must apply demands the interpretation placed upon the provisions of the treaty by the Circuit Court of Appeals.

If the Pigeon River is to remain "free and open" as provided by the treaty, the Canadian company should not be permitted to collect tolls and particularly not on American timber which also goes down the Pigeon River to Lake Superior.

The argument, therefore, that this Court should reverse the Circuit Court of Appeals on account of the Canadian decision and to protect the Canadian company in the collec-

tion of tolls, is not very convincing, however desirable uniformity of decisions may be. We submit that it is of greater importance to have the decision of this court right than it is to have it follow the Canadian decision.

OTHER TREATIES.

The appellant calls attention to the use of the words, "free and open," in the Treaty of Paris and the Treaty of Washington. Counsel argue that the United States has surrendered a surprising amount of control over the Mississippi and that Canada has surrendered a surprising amount of control over the St. Lawrence, if our theory is correct.

It must be remembered that the Mississippi is not a boundary water. Neither is that part of the River St. Lawrence referred to in the Treaty of Washington a boundary water. These are interior waters. And the Treaty of Washington specifically provides that commerce on the St. Lawrence is subject to laws and regulations of Great Britain or Canada.

The Panama Canal Treaty is entirely different. It provides that the canal shall be free and open, "on terms of entire equality" so that there shall be "no discrimination" against any such nation in respect of "the conditions or charges of traffic." Here, we have incorporated in the treaty the same idea which Webster, in his correspondence with Ashburton, had in mind when he wrote, "without subjection to any discriminating toll, duty or disability." It is the same idea which Lord Ashburton described as follows: "On the same terms as the river is used by the Queen's subjects."

The fact that appropriate language is used to permit the collection of tolls where equal treatment is intended and that no such language is used where a river is "free and open to the use of the citizens and subjects of both countries," is the

strongest kind of an argument that the expression, "free and open," means exactly what the words imply.

PRESIDENT TYLER'S MESSAGE.

President Tyler, in his message to the Senate, did not use the word, "common," with reference to the use of channels under the Webster-Ashburton Treaty. In pointing out the weakness of the Treaty of Ghent and discussing the reasons why the provisions of that treaty brought about a difference which has "sometimes lead to great irritation" the President said that the Treaty of Ghent had made no provision for the common use of the waters by the citizens and subjects of both countries. Referring to the Webster-Ashburton Treaty, however, he said (Senate Documents, Third Session, 27th Congress, Vol. I, pp. 20-21): "The line of boundary, then, from the source of the St. Croix to the St. Lawrence, so far as Maine and Massachusetts are concerned, is fixed by their own consent, and for consideration satisfactory to them; and the chief of these considerations being the privilege of transporting the lumber and agricultural products growing and raised in Maine on the waters of St. Johns and its tributaries down that river to the ocean, free from imposition or disability. The importance of this privilege, perpetual in its terms, to a country covered at present by pine forests of great value, and much of it capable hereafter of agricultural improvement, is not a matter upon which the opinion of intelligent men is likely to be divided."

He also said (22), in referring to the channels in the Rivers St. Lawrence, Detroit and St. Clair, that "the treaty provides that all the several passages and channels shall be free and open to the use of the citizens and subjects of both countries."

This language does not support a claim that "free and open" and "common" are synonymous expressions. The President called attention to the fact that the failure to make provision for some common use of the boundary waters had led to differences and caused some irritation; but apparently was of the opinion that there would be no further disputes because the agreement did more than provide for the common use of the boundary waters, it provided that the passages and channels shall be free and open to the use of the citizens and subjects of both parties.

NAVIGABILITY.

It is the claim of appellee that navigability is not a controlling factor in this litigation.

In order to determine whether or not navigability is important, we must have in mind what waters were navigable at the time the Webster-Ashburton Treaty was written. We may assume that Daniel Webster and Lord Ashburton knew what was a navigable water. They did not say that *navigable waters* along the line between Lake Superior and Lake of the Woods shall be free and open. They said "all water communications and all the usual portages along the line" shall be free and open.

It appears that the expression, "water communications," was used advisedly. In Article 3 of the Webster-Ashburton Treaty it is provided that "navigation" of the River St. John between Maine and New Brunswick shall be free and open, subject to regulations which Maine and New Brunswick may make respecting navigation where both banks belong to the same party.

In Article 7 of the treaty, it is provided that the channels in the River St. Lawrence; and the channels in the River

Detroit, shall be free and open to the "ships, vessels and boats of both parties." But, in Article 2 of the treaty, with reference to the boundary between Lake Superior and Lake of the Woods, the parties did not say that navigation shall be free and open on the Pigeon River. They did not say that the channels of the Pigeon River shall be free and open to the ships, vessels and boats of both parties. But they did say that "all water communications and all the usual portages" shall be "free and open to the use of the citizens and subjects of both countries." This did not refer to nor was it intended to refer to navigable water. The expression used is more comprehensive than the provisions relating to some of the other waters along the line. The treaty made the Pigeon River a border stream free and open to the citizens and subjects of both countries, for whatever purpose this stream might be useful.

Under the common law of England, tide water and navigable water were synonymous terms. This Court followed the rule of the common law of England. And the tide water test of navigability was applied in both countries at the time the Webster-Ashburton Treaty was written. *The Genesee Chief*, 12 How. 443. *The Thomas Jefferson*, 10 Wheat. 428.

In the case cited, *The Genesee Chief*, decided in 1851, after the Webster-Ashburton Treaty was signed and approved, this Court overruled its earlier decisions and held that the English rule was not adaptable to this country and that the lakes and rivers in which there is no tide but which are—in fact—navigable, are also public navigable waters. But we must assume that Webster and Ashburton had in mind the doctrine of the common law of England, so far as navigability was concerned, because the tide water test was in effect at the time.

Since the case of *The Genesee Chief* this Court has extended the rule so that the definition of navigability in the United States Courts at the present time is as follows:

"That those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The Montello, 20 Wall. 430.
The Daniel Ball, 10 Wall. 557.
The Hine, 4 Wall. 555.

"The true test of navigability of a stream does not depend upon the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation."

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway."

"The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so, the river is navigable in fact, although its navigation may be encom-

passed with difficulties by reason of natural barriers, such as rapids and sand bars."

The Montello, 20 Wall 430

The decisions in the cases just cited, as well as the decision in *The Genesee Chief*, *supra*, were filed between 1850 and 1875, after the Webster Ashburton Treaty was signed and approved by Great Britain and the United States. It was during this period that the rule of navigability quoted above was established in the United States Courts.

As the question of navigability came up in the courts of the different states, the rule was further extended. Some courts have taken as the test of legal navigability the capacity of the water to afford a passage for sea vessels. In other jurisdictions, a river is navigable if it is capable of floating rafts as distinguished from single logs. And in many of the states, streams which are merely floatable and useful for logging purposes, are navigable so far as the public use is concerned.

45 *Corpus Juris* 101 111.

The latter rule is the rule which has been adopted in Minnesota as well as in other states in which the timber industry was carried on.

"The public have a right of way in every stream which, in its natural state and ordinary volume, is capable of transporting to market the products of the forest or mines or of the soil along its banks. It is not essential that the property to be transported shall be carried in vessels or be guided by the hand of man. Nor is it necessary that the stream shall be capable of navigation against the current, or that it shall be navigable

at all seasons of the year. It is sufficient, if, from natural causes, it is navigable at certain seasons."

Minnesota Canal and Power Company vs. Koochiching Company, 97 Minn. 429, 107 N. W. 405.

But the intention of the parties to the Webster Ashburton Treaty cannot be determined by applying the modern rule of navigability as the same is now stated by the United States Courts or by the Supreme Court of Minnesota, because these rules of navigability had not been established when the Webster Ashburton Treaty was written, and, as stated above, the rule in this Court then depended upon the ebb and flow of the tide. In extending the rule from tidal waters, this Court may very well have adopted the rule which is in force in Minnesota and a number of the other timber states. But the intention of the parties to the treaty must be determined as of the time the treaty was written.

The appellee contends that navigability is not a controlling factor or of any particular importance in this litigation. If a border water is in fact navigable it is by the law of nations and without a treaty provision "free and open to the citizens and subjects" of the countries on either side of the river (*The Fame*, Fed. case No. 4634). We may concede that a non navigable border stream is not free and open, without a treaty provision to that effect. But it is clear, that, regardless of navigability, the Pigeon River was one of the "water communications" between Lake Superior and Lake of the Woods and by the terms of the Webster Ashburton Treaty is free and open to the use of the citizens and subjects of both countries.

Suppose we assume that the Pigeon River is not a navigable stream and apply the law relating to non-navigable streams and try and determine the rights of the riparian

proprietors and the jurisdiction of the Governments on either side of the stream. It is fundamental, of course, that the State of Minnesota has no jurisdiction beyond the center of the stream. The riparian proprietors on the Minnesota side would have title to the shore and bed of the stream to the imaginary boundary line and the State of Minnesota would have jurisdiction to the center of the stream. The Canadian Government and the people of Canada would own to the center of the stream and have the same rights on the Canadian side. We would have riparian proprietors on opposite sides of the stream with an international boundary as a dividing line. Even if the stream were not an international highway, the riparian owners would be obliged to use or control the running water in such a manner as not to infringe upon or prejudice the rights of other riparian proprietors to the use of the stream.

> "No proprietor has the right to use the water to the prejudice of other proprietors above, or below, or opposite, unless he has a prior right of diversion or a title to an exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua Currit et debet currere ut currere solebat* is the maxim. He must not unreasonably detain it or give it another direction, and must return it to the original channel when it leaves his estate. By virtue of his ownership of the banks and the land in front thereof to the middle of the stream, each riparian proprietor has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and no proprietor has the right to diminish the quantity which will flow, according to the natural current, to a proprietor below."
>
> *Pinney vs. Luce*, 44 Minn. 367, 46 N. W. 561.

If this is the rule between owners of property on non-navigable water courses, by what authority can the State of Minnesota control the water in this border stream? Regardless of navigability, who owns the water in Pigeon River? Who has the right to control the flow of the water in Pigeon River? Who has authority to legislate regarding the use of this border stream?

In the case of *Stillman vs. White Rock Manufacturing Company*, Federal case No. 13446, the plaintiffs, citizens of Connecticut, asked for an injunction against diversion of water from the Pawtucket River which forms the dividing line between Connecticut and Rhode Island. The defendants had a dam in the river and had built a canal on the Rhode Island side where they owned a mill site. The plaintiffs owned a dam 250 feet down the river and the canal carried the water below plaintiffs' dam. The Court granted the injunction and in the opinion said:

> "It becomes necessary, therefore, to ascertain now, what is the interest, if any, which the complainants by owning land on the Connecticut side of the river are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy. After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described to an undivided half of the water on that side, as well as on the other side. A fence or improvement cannot be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence it is reasonable to regard these interests in the whole stream to be an undivided half, or a tenancy in common, and if

either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere."

* * * * * * * * *

"The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream, and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H. 259. The first and direct injury, then, is to the easement and consequent rights existing beyond the center."

If the Pigeon River is not a navigable stream, the State of Minnesota could not grant to the defendant the right to improve it or collect tolls thereon. In such a case the state might, in the exercise of the right of eminent domain, authorize a corporation to condemn the property, but the statute under which the defendant is organized does not grant such a right to the defendant and it was not the intention of the Legislature so to do. The defendant is not a riparian proprietor and is not exercising the usual rights of a riparian owner. And, even in its exercise of the power of eminent domain, the state could not authorize the taking of property beyond the international boundary nor could it exercise any control over the water in the stream, because this would belong to the owners on both sides of the international boundary line. The control of the water in the river on one side results in the taking of property on the other side. The usual powers of the state respecting navigable

waters within its borders do not extend to non navigable streams. The defendant therefore, has no right, under its charter as a boom company, to dam or improve or obstruct or collect tolls on the Pigeon River, if it is a non navigable stream.

In the Clark case the Circuit Court of Appeals said:

> "The Webster Ashburton Treaty was drawn by experts skilled in such affairs, who must be supposed to have known exactly what they were doing. If they were referring only to navigable water communications being kept free and open it would have been very easy to have so stated, but the treaty does not so state. Where it was considered important in the treaty to refer to navigable streams that course was followed. * * * As to the Pigeon River it was not said that navigation should be free and open but that 'all water communications' shall be 'free and open.' * * * If Daniel Webster and Lord Ashburton had intended to confine the clause in question here to navigable waters they would have used such term. It is significant that they did not do so. Why should the Court write into their language something they evidently intentionally omitted?"

We respectfully submit that, regardless of navigability, the Pigeon River was made an international highway by the terms of the Webster-Ashburton Treaty and that navigability is not of any particular importance in this litigation.

ACT OF CONGRESS.

The appellant now relies upon an Act of Congress (31 U. S. Stat. 1455, Chap. 878) and claims that by this act it was authorized to improve Pigeon River and collect tolls on appellee's pulpwood.

This Act of Congress merely gives to appellant the right "to enter upon Grand Portage Indian Reservation and improve Pigeon River at what is known as the cascades of said river, for the purpose of making such river *at said point* navigable for floating logs." It seems clear that "cascades" refers to the one point in the river referred to by that name.

Any improvement under this act was to be made "under such rules and regulations and *subject* to such conditions and limitations as the Secretary of the Interior may prescribe." These rules and regulations and conditions and limitations were conditions precedent to the improvement of the river. There is nothing in the amended complaint to indicate that any rules or regulations were prescribed by the Secretary of the Interior or that the improvement authorized to be made under such rules and regulations was in fact made.

We recognize the rule stated by this Court to the effect that an Act of Congress is of equal rank with a treaty provision but "an intention to alter and *pro tanto* abrogate a treaty is not to be likely attributed to Congress" (*U. S. vs. Payne*, 246 U. S. 446).

The Court will take judicial notice of an Act of Congress but one who seeks the benefit of a statute must, *by averment and proof*, bring himself within its provisions.

People vs. Jackson, 24 Cal. 631.

Burrell vs. Howe, 40 Cal. 373.

Rohda vs. Alameda County, 52 Cal. 350.

McCullough vs. Colfax County, 95 N. W. (Neb.) 29.

Hatch vs. Peel, 23 Barb. (N. Y.) 575.

Moore vs. Hammond, 121 Fed. 759; Certiorari denied, 191 U. S. 569.

Byron vs. Board of Water Commissioners, 41 Minn. 519, 43 N. W. 482.

21 *R. C. L.* 444.

12 *C. J.* 407, Note 17 (8).

40 *C. J.* 58.

In its amended complaint the plaintiff alleged that it is a corporation organized under the laws of the State of Minnesota and "*as such* was at all times and is empowered to construct, maintain, operate and manage dams, sluices, flumes, slides, locks, reservoirs, bulkheads, booms and other structures useful or expedient in properly improving, developing and using the water supply for the purpose of handling, floating or navigating logs, ties, poles, posts, timber and wood of every description upon, over and in that part of the stream commonly known as Pigeon River, bordering or lying within the boundaries of Cook County, Minnesota, and its tributaries, as well as clearing, straightening and improving the channel of said stream, and to charge, receive and collect tolls and compensation for the use of said improvements and property in running, driving and handling said timber products, and to contract with other companies for the improvement, maintenance, operation and use of such other improvements upon Pigeon River and its tributaries in Canada, as may be expedient, and to do all acts and transact all business authorized by law connected with or incidental to the construction, ownership, maintenance

and operation of an improvement, slide and boom company, and the properties connected therewith."

In appellant's assignments of error (Transcript of Record, pages 45-47), the appellant assigns as error the decision of the Circuit Court of Appeals in holding that the Minnesota law under which it is organized is repugnant to the Constitution of the United States and the Webster Ashburton Treaty; in holding that Section 8 of Article I of the Constitution of the United States prevents appellant from collecting tolls pursuant to permission conferred by appellant's charter from the State of Minnesota; in holding that the Webster Ashburton Treaty prevents appellant from collecting tolls pursuant to the Minnesota law; and in holding that the movement of timber on Pigeon River is foreign commerce over which the State of Minnesota cannot exercise control to the extent of chartering appellant to improve the river and collect tolls thereon.

No reference is made, either in the amended complaint or in the assignments of error to the Act of Congress (31 U. S. Stat. 1455, Chapter 878) or to any authority from the Federal Government.

It is apparent that the Act of Congress now relied upon gave appellant no such powers or rights as are alleged in the amended complaint.

The title of this Act of Congress is as follows: "An Act to authorize Pigeon River Improvement, Slide and Boom Company of Minnesota to enter upon the Grand Portage Indian Reservation, and improve the Pigeon River in said state at what is known as the cascades of said river." In the body of the act, the appellant is authorized "to enter upon the unallotted lands and with the consent of the allottees upon any allotted lands," adjacent to the cascades, of the Grand Portage Indian Reservation. The appellant was also

authorized to take timber from the unallotted lands at a price to be agreed upon with the Secretary of the Interior.

The entry upon the reservation seems to be the important thing covered by the act. The act was considered necessary only because of the existence of the reservation adjacent to a portion of the river. It was so presented to Congress (Congressional Record, 56th Congress, 2nd Session, page 3162). Perhaps, the appellant, at the time, was relying upon its Minnesota charter for authority to improve the river and collect tolls but had an idea that title to the bed of the stream was in the riparian owners. It would have to have authority from Congress to enter the reservation and cut timber. If the bed of the stream were owned by riparian owners, it would have to have the consent of Congress to improve the point on the river known as the cascades because the reservation is adjacent to this point.

It may be that this act would, under rules and regulations prescribed by the Secretary of the Interior, authorize appellant to enter the reservation and cut timber and grant to appellant whatever permission would ordinarily be required from a riparian owner, to enter upon and improve the river at the point known as the cascades which adjoins the reservation. But it can hardly be said that a bill written in this form and presented in the manner stated, was intended to alter and abrogate a treaty of the United States.

In its amended complaint and in its assignments of error, plaintiff based its claim to tolls upon the authority which the State of Minnesota attempted to grant to it. The appellant, Pigeon River Improvement, Slide & Boom Company, was named in this Act of Congress. If the appellant had relied upon authority granted by the Act of Congress and had improved Pigeon River under rules and regulations prescribed by the Secretary of the Interior, the officers of the plaintiff

company would surely have known something about it. It would not have been possible for the plaintiff to permit this litigation to go through the District and Circuit Courts without calling such authority to the attention of the Court. The fact is that the appellant did not rely upon authority granted to it by the United States under this Act of Congress or otherwise. It based its claim to tolls upon the authority which the State of Minnesota attempted to grant to it. But it appears now that the state could grant no authority for the improvement of an international highway or for the collection of tolls on Canadian pulpwood floating down a boundary water. And, we respectfully submit, the Federal Government has granted no such authority. And we further submit, that, before appellant could become vested with any rights or authority on the Pigeon River under the act referred to, it would have to make the improvement authorized by Congress under such rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe. In order to state a cause of action, it would have to plead that these conditions precedent had been performed. The amended complaint does not allege that any such rules or regulations were prescribed or that any improvement was made thereunder, consequently, the appellant cannot now rely upon this Act of Congress.

ACT OF CONGRESS RELATING TO IMPROVEMENT OF WATERS OF THE UNITED STATES.

An Act of Congress approved March 3rd, 1899 (30 U. S. Stat. 1151) provides:

> "It shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, road-

stead, haven, harbor, canal, navigable river, or other waters of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War."

We respectfully submit that any water which by the terms of a treaty is made the boundary between the United States and a foreign country and which is free and open to the citizens of both countries and which has been made a highway for foreign commerce, is included in the waters described in the Act of Congress just above quoted.

CONCLUSION.

We respectfully submit:

First: That, under the Webster-Ashburton Treaty, the Pigeon River, from main shore to main shore, is and always has been a boundary water.

Second: That the Pigeon River, from its mouth, is one of the "water communications" referred to in the Webster-Ashburton Treaty.

Third: That the movement of Canadian pulpwood on the Pigeon River is foreign commerce.

Fourth: That the collection of tolls on Canadian pulpwood floating down the Pigeon River is a violation of the Webster-Ashburton Treaty.

Fifth: That the State of Minnesota had no authority to grant to appellant the right to improve Pigeon River or to collect tolls thereon.

Sixth: That the United States has not granted to appellant the right to collect tolls on Canadian pulpwood floating

down the Pigeon River on its way to Lake Superior and Canadian mills and particularly not on pulpwood which floats into Pigeon River below the cascades.

Seventh: That the improvement of Pigeon River under rules and regulations and subject to such conditions and limitations as the Secretary of the Interior may prescribe was a condition precedent to the vesting of any rights in the appellant under the Act of Congress (31 U. S. Stat. 1455, Chap. 878) and to state a cause of action plaintiff would have to plead that these conditions had been performed.

Eighth: That navigability is not a controlling factor nor of any particular importance in this litigation.

Ninth: That the Root-Bryce Treaty does not repeal the Webster-Ashburton Treaty.

Tenth: That the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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